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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 531

FRANK G. BUFFUM,

Petitioner,

vs.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a national banking association,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

WALTER F. DODD
and
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NO.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

Your petitioner, Frank G. Buffum, represents to this Honorable Court as follows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

On the basis of diversity of citizenship, an action was brought in the United States Court for the Northern District of Illinois by the petitioner, a citizen of the State of Illinois against the respondent, a national banking association, whose principal place of business is located in the State of New York, which, by virtue of Section 1348 of Title 28 of the United States, is deemed a citizen of the State of New York (Trans. 16-17).

The respondent has been licensed to do business in Illinois since 1931 and continues to do business in Illinois. The respondent holds a Certificate of Authority from the State of Illinois "FOR A TERM OF 99 YEARS to transact the following business in this State, namely: To accept and execute trusts and carry on a general trust business . . . and it is entitled to all the rights and privileges granted to foreign corporations of this State and *subject to ALL the liabilities imposed by law upon foreign corporations*" (Trans. 19). The respondent made a motion to dismiss on the ground of venue which was sustained by the decision of the United States Court of Appeals for the Seventh Circuit (Trans. 41).

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 24, 1951 (Trans. 41). The jurisdiction of this Court is invoked under Sections 1254(1) and 2101(c) of Title 28 of the United States Code.

QUESTIONS PRESENTED.

The questions presented are:

1. Does Section 1391(c) of Title 28 of the United States Code or Section 94 of Title 12 of the United States Code apply to the case at bar?

2. May the respondent, who has been licensed to do business by the State of Illinois, who since 1931 is holding a Certificate of Authority to do business in Illinois for 99 years, who has been doing business in Illinois for 20 years and continues to do business in Illinois "subject to ALL the liabilities imposed by law upon foreign corporations" (Trans. 19), avoid venue of the United States District Court in Illinois?

3. Is Section 94 of Title 12 of the United States Code exclusive, or may the present action be brought under Section 1391 of Title 28 of the United States Code?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

I.

Rule 38(5)(b) of the Supreme Court of the United States provides that one of the reasons for the granting of certiorari is that a United States Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this court." We respectfully submit that the case at bar clearly presents such a situation in view of the conflict of decisions which should be settled by this Court.

Section 1391(c) of Title 28 of the United States Code, which went into effect on September 1, 1948, provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business

> or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

With regard to said Section, Professor James W. Moore, who was a special consultant to the revisors of the new Judicial Code, as well as chief research assistant to the reporter of the Supreme Court Advisory Committee on Federal Rules of Civil Procedure, and author of Moore's Federal Practice, states in his "Commentary on the U. S. Judicial Code", at page 194:

> "This is a provision of general applicability to a corporate defendant, whether the case be one governed by a general venue provision, or by a special venue provision within Title 28, such as Section 1400(b) governing a patent infringement action, or by a special venue provision contained in some other title of the United States Code."

There are, in the United States Code, a number of special venue provisions. Thus, as to an action against a corporation under the *Federal anti-trust laws,* Section 22 of Title 15 of the United States Code provides that it "may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business." As to an action under the Merchant Marine Act, popularly referred to as the *Jones Act,* Section 688 of Title 46 of the United States Code provides that it may be brought in "the court of the district in which the defendant employer resides or in which his principal office is located." As to *patent infringement,* Section 1400(b) of Title 28 of the United States Code provides that an action "may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." As to *national banking associations,* Section 94 of Title 12 of the United States

Code provides that "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established".

On December 19, 1950, the United States District Court for the Eastern District of Pennsylvania, in the three cases of *Lipp* v. *National Screen Service Corporation, Siegel* v. *National Screen Service Corporation* and *Schrader* v. *National Screen Service Corporation,* 95 F. Supp. 66, held, after a full examination of the authorities on the subject, that Section 1391(c) of Title 28 of the United States Code supersedes Section 22 of Title 15 of the United States Code as to *anti-trust* litigation against a corporation.

On July 7, 1950, the United States District Court for the Southern District of New York in the case of *Mincy* v. *Detroit & Cleveland Navigation Co.,* 94 F. Supp. 456, held that Section 1391(c) of Title 28 of the United States Code supersedes Section 688 of Title 46 of the United States Code as to litigation against a corporation under the *Jones Act.* Likewise, on January 26, 1950, the United States District Court for the District of Delaware, in *Bounds* v. *Streckfurs Steamers, Inc.,* 89 F. Supp. 242, held that Section 1391(c) of the United States Code supersedes Section 688 of Title 46 of the United States Code in litigation against a corporation under the *Jones Act.* Likewise, in *Bagner* v. *Blidberg Rothschild Co.,* 84 F. Supp. 973, the United States District Court for the Eastern District of Pennsylvania, on July 7, 1949, held that Section 1391(c) of Title 28 of the U. S. Code supersedes Section 688 of Title 46 of the United States Code in litigation against a corporation under the *Jones Act.*

On July 13, 1950, the United States District Court for the Southern District of California, in the case of *Farr Co.* v. *Gratiot,* 92 F. Supp. 320, held that Section 1391(c) of

Title 28 of the United States Code supersedes Section 1400(b) of Title 28 of the United States Code in litigation against a corporation involving *patent infringement.*

In opposition to the above seven cases and the statement of Professor Moore, there are the following cases:

On May 29, 1950, the United States District Court for the District of Columbia, in *Nachtman* v. *Jones & McLaughlin Steel Corporation,* 90 F. Supp. 739, held that Section 1391(c) of Title 28 of the United States Code did not supersede 1400(b) of Title 28 of the United States Code pertaining to patent infringement. On August 2, 1950, the United States District Court for the Southern District of California, in the case of *Gulf Research & Development Co.* v. *Schlumberger Well Surveying Corp.,* 92 F. Supp. 16, held that Section 1391(c) of Title 28 of the United States Code did not supersede Section 1400(b) of Title 28 of the United States Code. The Judge writing the opinion said: "I am fully aware that two of my able brethern of this district have arrived at a different conclusion than I have here expressed". On July 18, 1949, in *International Refugee Organization* v. *Bank of America,* 86 F. Supp. 884, the United States District Court for the Southern District of New York, by way of *dictum only,* held that Section 1391(c) of Title 28 of the United States Code did not supersede Section 94 of Title 12 of the United States Code. It is this dictum which was followed by the court in the case at bar.

It is of interest to note that this conflict of authority exists between some of the judges of the very same courts. Thus, in the United States Court for the Southern District of California, Judge Hall, in *Farr & Co.* v. *Gratiot,* 92 F. Supp. 320, held that Section 1391(c) of Title 28 of the United States Code superseded Section 1400(b) of Title 28 of the United States Code in litigation against the corporation involving patent infringement, whereas, Judge

Harrison of the same court, in *Gulf Research & Development Co.* v. *Schlumberger Well Surveying Corp.*, 92 F. Supp. 16, held to the contrary. Likewise, in the United States District Court for the Southern District of New York, Judge Leibell, in *International Refugee Organization* v. *Bank of America*, 86 F. Supp. 884, on July 18, 1949, by way of dictum, held that Section 1391(c) of Title 28 of the United States Code did not supersede Section 94 of Title 12 of the United States Code, whereas Judge Noonan of the same court, on July 7, 1950, in the case of *Mincy* v. *Detroit & Cleveland Navigation Co.*, 94 F. Supp. 456, decided that Section 1391(c) of Title 28 of the United States Code supersedes the venue provisions of the United States Code as to litigation against the corporation.

It is, therefore, clear that the case at bar presents "an important question of federal law which has not been, but should be, settled by this court", as provided in Rule 38(5)(b) of this Court. In *Mississippi Publishing Corporation* v. *Murphree*, 326 U. S. 438 (1946), this court pointed out at page 440 that it granted certiorari because "The lower courts have not been consistent in the application of Rule 4(f)". Likewise, in *Hickman* v. *Taylor*, 329 U. S. 495 (1947), this court said at page 500: "The importance of the problem, which has engendered a great divergence of views among district courts, led us to grant certiorari".

II.

Rule 38(5)(b) of the Supreme Court of the United States provides that one of the reasons for the granting of certiorari is that a United States Court of Appeals "has decided a federal question in a way probably in conflict with applicable decisions of this court". In *Neirbo Co.* v. *Bethlehem Shipbuilding Corporation*, 308 U. S. 169 (1939), a suit based on diversity of citizenship, the Supreme Court

of the United States held that a foreign corporation's designating of an agent for service of process in conformity with the law of a state, constitutes "consent" to be sued in a federal court for that state and satisfies the requirements of the federal statute providing that where jurisdiction is founded on diversity of citizenship, suit shall be brought only in the district of the "residence" of either plaintiff or defendant. The same was held in *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4 (1939) and in *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438 (1946). In the case at bar the respondent, The Chase National Bank of the City of New York, has been licensed to do business in Illinois since 1931, and continues to do business in Illinois. The respondent holds a Certificate of Authority from the State of Illinois "for a term of 99 years to transact the following business in this State, namely: To accept and execute trusts and carry on a general trust business . . . and it is entitled to all the rights and privileges granted to foreign corporations of this State and subject to ALL the liabilities imposed by law upon foreign corporations" (Tran. 19). One of said liabilities in being licensed to do business in the State of Illinois is that "Service of process in any suit, action or proceeding . . . to be served on a foreign corporation may be made on such corporation by service thereof on the registered agent of such corporation." (Ill. Rev. Stat., 1949, Ch. 32, Sec. 157.111). This law is applicable to every corporation without exception, because Section 22 of Article IV of the Illinois Constitution of 1870 provides that "The General Assembly shall not pass local or special laws . . . Granting to any corporation, association or individual any special or exclusive privileges, immunity or franchise whatever." Despite all of the above, the Court of Appeals held that the respondent did not waive venue.

It is, therefore, clear that in the case at bar the Court of Appeals "has decided a federal question in a way probably in conflict with applicable decisions of this court", as provided in Rule 38 (5)(b).

III.

Rule 38(5)(b) of the Supreme Court of the United States provides that one of the reasons for the granting of certiorari is that a United States Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this court".

Section 94 of Title 12 of the United States Code does not contain any words of exclusion. It provides:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial Court of the United States held within the district in which such association may be established, or in any State, County, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

It is to be noted that the word "only" does not appear anywhere in said Section 94. An examination of the whole United States Code shows that whenever Congress desired to restrict venue to a particular judicial district it employed the word "only". (See Brief herein, pages 33-35.) The Court of Appeals held in the case at bar that Section 94 was exclusive and that, therefore, the petitioner could not bring his action under Section 1391 of Title 28 of the United States Code.

It is, therefore, clear that the case at bar presents "an important question of federal law which has not been, but should be, settled by this court."

PRAYER.

Wherefore, your petitioner, Frank G. Buffum, prays this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit commanding the said United States Court of Appeals for the Seventh Circuit to transmit the record in No. 10456 of said court, entitled *Frank G. Buffum, plaintiff-appellant* v. *The Chase National Bank of the City of New York, defendant-appellee,* to this Court to be reviewed by this Honorable Court, and upon such a review the judgments of the United States District Court for the Northern District of Illinois and of the United States Court of Appeals for the Seventh Circuit be reversed and remanded with instructions to proceed in accordance with the views of this Honorable Court.

FRANK G. BUFFUM,
Petitioner

WALTER F. DODD
and
HARRY G. FINS,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF COURTS BELOW.

The Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, did not render a written opinion. The opinion of the United States Court of Appeals for the Seventh Circuit appears on pages 36-40 of the Transcript of the Record and is reported in 192 Fed. (2) 58.

ERRORS TO BE URGED.

The courts below committed error in not deciding as follows:

I. Section 1391(c) of Title 28 of the United States Code is applicable to all defendant corporations.

II. The defendant waived venue.

A. The defendant waived venue by the appointment of an Illinois Agent for service of Process.

B. The defendant waived venue by doing business in Illinois for twenty years.

C. The defendant was properly served in accordance with Rule 4(d)(3) of the Federal Rules of Civil Procedure.

D. The defendant was properly served in accordance with Rule 4(d)(7) of the Federal Rules of Civil Procedure.

E. Defendant's contention is contrary to law and facts of which all courts take judicial notice.

III. Section 94 of Title 12 is not exclusive and the present action may be brought under Section 1391 of Title 28 of the United States Code.

A. The District Court for the Northern District of Illinois is the proper venue by virtue of the plaintiff's residence.

B. Section 94 of Title 12 of the United States Code has no application to the case at bar.

C. Section 94 of Title 12 of the United States Code is merely permissive, not exclusive.

STATEMENT OF THE CASE.

The facts as set forth in the Amended Complaint, which stand admitted as a matter of law, are as follows:

1. Frank G. Buffum, the plaintiff, is a citizen of the State of Illinois, and resides at Chicago, Illinois, in the Northern District of Illinois (Trans. 16-17).

2. The Chase National Bank of the City of New York, defendant, is a national banking association organized and existing under and by virtue of the laws of the United States, and has had at all times and still has its principal office and place of business located in the State of New York. The said defendant is for the purpose of this action deemed a citizen of the State of New York, as provided in Title 28 of the United States Code, Section 1348 (Trans. 17).

3. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (Trans. 17).

4. The United States District Court has original jurisdiction of this action, as the matter in controversy exceeds the sum of Three Thousand Dollars, exclusive of interest and costs, and is between citizens of different states, as provided in Title 28 of the United States Code, Section 1332 (Trans. 17).

5. The Chase National Bank of the City of New York, defendant herein, is and has been since January 5, 1931, licensed to do business and is doing business in the State of Illinois as a foreign corporation, as more fully appears from plaintiff's Exhibits "A" and "B" hereto attached

and made a part hereof, which are copies of Certificates of Authority issued by the Secretary of State of the State of Illinois and the Auditor of Public Accounts of the State of Illinois, respectively. In accordance with the law of the State of Illinois, which requires a foreign corporation desiring to do business in the State of Illinois, to appoint an Illinois resident as an agent for service of legal process, the defendant appointed an Illinois resident as its agent for service of legal process, as appears from plaintiff's Exhibit "C", hereto attached and made a part hereof. From August 25, 1942, to and including the present time, the defendant's Illinois registered agent, as shown by plaintiff's Exhibit "A", has been and is the C. T. Corporation System, and the address of the defendant's Illinois registered office has been and is 208 South LaSalle Street, Chicago, Cook County, Illinois, which agent and office are situated within the Northern District of Illinois, Eastern Division. The venue of this action is laid in the United States District Court for the Northern District of Illinois, in accordance with Title 28 of the United States Code, Section 1391 (Trans. 17).

The Exhibits which are attached to the Amended Complaint show that in 1930 the Chase National Bank of the City of New York filed an Application with the Secretary of State of the State of Illinois, wherein it stated that "The corporation proposes to pursue under its charter the following business in the State of Illinois: The acceptance and execution of trusts and a general trust business," and designated an Illinois agent "for the purpose of accepting service upon said corporation, in all suits that may be commenced against it" (Trans. 22-23). On January 5, 1931, the Secretary of State of the State of Illinois issued to the respondent a Certificate of Authority from the State of Illinois "FOR A TERM OF 99 YEARS to transact the

following business in this State, namely, To accept and execute trusts and carry on a general trust business . . . and it is entitled to all the rights and privileges granted to foreign corporations of this State and *subject to ALL the liabilities imposed by law upon foreign corporations*" (Trans. 19).

On August 25, 1942, The Chase National Bank appointed its present registered agent in Illinois, the C. T. Corporation System, reciting "The undersigned corporation . . . for the purpose of changing its registered agent . . . in Illinois as provided by the provisions of 'The Business Corporation Act' of Illinois, represents that: . . . The name of the Corporation is The Chase National Bank of the City of New York . . . The name of its new registered agent is C. T. Corporation System," and said C. T. Corporation has continued to be its Illinois registered agent (Trans. 20).

6(a). In addition to the office of its registered agent, the defendant has an office at 135 South La Salle Street, Chicago, Illinois, where the name of the defendant is painted and exhibited on the door. The defendant is a subscriber for telephone service at Chicago, Illinois, and has a Chicago telephone number assigned to it, same being State 2-1380. Under said telephone number the defendant is listed in the Chicago Telephone Directory and is listed under the classification of "Banks" in the Chicago Classified Telephone Directory. The defendant also maintains a teletype station at Chicago, Illinois (Trans. 28-29).

(b). The plaintiff is and for many years has been a merchant engaged in the business of buying and selling steel at Chicago, Illinois (Trans. 29).

(c). A "letter of allocation" in the steel industry is a document issued by the steel mill and is an obligation on

the part of the issuer to deliver the quantity of steel mentioned in the letter to the holder of said letter (Trans. 29).

(d). In reliance upon the representations of the defendant, made at Chicago, Illinois, on May 18, 1950, that the defendant was holding two "letters of allocation" of cold rolled sheet steel for 175,000 tons, which letters of allocation were to be delivered to a purchaser within five days from the receipt of an order for the steel, the plaintiff, at Chicago, Illinois, on May 25, 1950, sold said steel at a profit to a customer of the plaintiff and obtained from said customer, at Chicago, Illinois, an order for the purchase of said 175,000 tons of steel, and the plaintiff delivered said order, at Chicago, Illinois, in accordance with the directions of the defendant (Trans. 29).

7. After the plaintiff delivered said order for 175,000 tons of steel in accordance with the directions of the defendant, the defendant failed and refused and continues to refuse to carry out its undertaking to consummate the sale of the said 175,000 tons of steel, and the defendant has refused and continues to refuse to disclose the names of the steel mills which issued the letters of allocation (Trans. 18).

8. The plaintiff has performed on his part all acts which were to be performed by him and the plaintiff is ready, willing and able to do all further acts to consummate the sale and delivery of the said 175,000 tons of steel (Trans. 18).

9. By virtue of the defendant's failure and refusal to carry out its undertaking, the plaintiff suffered damages in the sum of $3,018,750.00 which the plaintiff would have earned as a profit in the sale of 175,000 tons of steel (Trans. 18).

The defendant filed a Motion to Dismiss, alleging (Trans. 23-24):

The defendant, The Chase National Bank of The City of New York, moves the Court as follows:

1. To dismiss the action against the defendant on the ground that the action is in the wrong district, because under 12 U.S.C. § 94 an action against the defendant national banking association may be had in a District Court of the United States only in the Southern District of New York, the only district in which the defendant is "established."

2. To dismiss the action against the defendant or, in lieu thereof, to quash the return of service of summons on the ground that the defendant is a national banking association organized under the laws of the United States and established in the Borough of Manhattan, City, County and State of New York, and was not and is not subject to service of process in this action within the Northern District of Illinois.

The District Court sustained the defendant's motion on the ground of venue and dismissed the above-entitled cause at plaintiff's cost (Trans. 30), and the Court of Appeals affirmed (Trans. 41).

ARGUMENT.

I.

Section 1391(c) of Title 28 of the United States Code is applicable to all defendant corporations.

The Chase National Bank of the City of New York, respondent herein, is and has been since January 5, 1931, licensed to do business and is doing business in the State of Illinois as a foreign corporation, as shown by petitioner's Exhibits "A", "B" and "C" attached to the Amended Complaint (Trans. 19-22).

Section 1391(c) of Title 28 of the U. S. Code provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and as such judicial district shall be regarded as the residence of such corporation for venue purposes."

That Congress intended Section 1391(c) to be applicable to all corporations is clearly evident by an examination of sub-sections (a), (b), (c) and (d) of Section 1391. It is to be observed that sub-section (a) provides "except as otherwise provided by law"; sub-section (b) likewise provides "except as otherwise provided by law", but no such exception appears in sub-section (c) or (d). *It is, therefore, clear that Congress intended sub-section (c), which is involved in the case at bar, to be without exceptions and that said section is applicable to all corporations.*

Said Section 1391 reads as follows:

> "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, *except as otherwise provided by law,* be brought only in the judicial district where all plaintiffs or all defendants reside.

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, *except as otherwise provided by law.*

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

"(d) An alien may be sued in any district." (Emphasis ours.)

Congressional intent is clearly expressed by the distinction in the language employed in sub-paragraphs (a) and (b), on the one hand, and the sub-paragraphs (c) and (d), on the other, by omitting from subparagraph (c) and (d) the phrase "except as otherwise provided by law."

Professor James W. Moore, who was a special consultant to the revisors of the new Judicial Code as well as chief research assistant to the reporter to the Supreme Court advisory Committee on Federal Rules of Civil Procedure and author of Moore's Federal Practice, states in his "Commentary on the U. S. Judicial Code" (1949) at pages 193-194:

"Prior to the Code a corporation was a resident of the state in which it was incorporated; and, more specifically, where the state of incorporation was divided into two or more districts, then in the district where its official residence was designated by the charter or state law and, in the absence of such designation, then in the district where the corporation maintained its home office. The Code has made no change in this rule relative to the residence of a corporate *plaintiff*. For venue purposes it has, however, radically altered the rule relative to a corporate *defendant*. Section 1391(c) provides:

" 'A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be

regarded as the residence of such corporation for venue purposes.'

"This is a provision of general applicability to a corporate defendant, whether the case be one governed by a general venue provision, or by a special venue provision with Title 28, *such as Section* 1400(b) *governing a patent infringement action, or by a special venue provision contained in some other title of the United States Code."* (Emphasis ours).

Since September 1, 1948, the date when the new Judicial Code went into effect, seven reported cases have followed the rule that Section 1391(c) supersedes special venue provisions. *Lipp* v. *National Screen Service Corporation, Siegel* v. *National Screen Service Corporation,* and *Schrader* v. *National Screen Service Corporation* (three cases), 95 F. Supp. 66; *Mincy* v. *Detroit & Cleveland Navigation Co.,* 94 F. Supp. 456; *Bounds* v. *Streckfur Steamers, Inc.,* 89 F. Supp. 242; *Bagner* v. *Blidberg Rothschild Co.,* 84 F. Supp. 973; *Farr Co.* v. *Gratiot,* 92 F. Supp. 320, which have been more fully discussed in the Petition for Certiorari (Pages 5-6 herein).

In *Schoen* v. *Mountain Producers Corporation,* 170 F. (2) 707 (C. A. 3, 1948) Circuit Judge Albert B. Maris, who was the Chairman of the Judicial Conference Committee on the Revision of the Judicial Code, appointed by the Chief Justice of the United States, said at page 713:

"Sections 1391(a), 1392(a) and 1401 of revised Title 28 U.S.C.A. carry forward these provisions of Sections 51 and 52 of the old Judicial Code as to venue in stockholders' derivative suits without changes. *But Section* 1391(c) *of revised Title* 28 *very substantially broadens the venue as to corporate defendants.* It provides: 'A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes' ". (Emphasis ours).

We respectfully submit that reason and authority support the proposition that as to corporate defendants Section 1391(c) of Title 28 of the United States Code supersedes all other venue provisions.

II.

The Defendant Waived Venue.

A.

The Defendant waived venue by the Appointment of an Illinois Agent for Service of Process.

Simply stated, the situation is as follows:

In 1930, The Chase National Bank applied to the Secretary of State of the State of Illinois for a Certificate of Authority to do business in Illinois, wherein it recited "The corporation proposes to pursue under its charter the following business in the State of Illinois: The acceptance and execution of trusts and a general trust business" (Trans. 23). The Chase National Bank then appointed an agent in Illinois **"for the purpose of accepting service upon said corporation, in ALL SUITS that may be commenced against it"** (Trans. 23).

In 1942, The Chase National Bank appointed its present registered agent in Illinois, the C. T. Corporation System, reciting "The undersigned corporation . . . *for the purpose of changing its registered agent . . . in Illinois AS PROVIDED BY THE PROVISIONS OF 'THE BUSINESS CORPORATION ACT,' OF ILLINOIS,* represents that: . . . The name of the Corporation is The Chase National Bank of the City of New York . . . The name of its new registered agent is C. T. Corporation System" (Trans. 20). THE PROVISIONS OF "THE BUSINESS CORPORATION ACT" of Illinois (Ill. Rev. Stats. 1949, Ch. 32, Sec-

tions 157.110 and 111) PROVIDE: "A foreign corporation may from time to time change its registered agent . . . SERVICE OF PROCESS IN ANY SUIT, ACTION OR PROCEEDING . . . to be served on a foreign corporation MAY BE MADE ON SUCH CORPORATION BY SERVICE THEREOF ON THE REGISTERED AGENT of such corporation".

The State of Illinois gave The Chase National Bank a Certificate of Authority "FOR A TERM OF 99 YEARS to transact the following business in this state, namely: To accept and execute trusts and carry on a general trust business . . . **subject to ALL the liabilities imposed by law upon such foreign corporations**". (Trans. 19). The Chase National Bank has used 20 years of said 99 year term and has been doing business in the State of Illinois during said 20 year period and is continuing to use said Certificate of Authority. One of said liabilities in being licensed to do business in the State of Illinois is that "SERVICE OF PROCESS IN ANY SUIT, ACTION OR PROCEEDING . . .to be served on a foreign corporation MAY BE MADE on such corporation by service thereof ON THE REGISTERED AGENT of such corporation". (Ill. Rev. Stat., 1949, Ch. 32, Sec. 157.111). *This law is applicable to every corporation without exception,* because Section 22 of Article IV of the Illinois Constitution of 1870 provides that "The General Assembly shall not pass local or special laws . . . Granting to any corporation, association or individual any special or exclusive privileges, immunity or franchise whatever."

In *Neirbo Co.* v. *Bethlehem Shipbuilding Corporation,* 308 U. S. 169 (1939) a suit based on diversity of citizenship, the Supreme Court of the United States held that a foreign corporation's designating of an agent for service of process in conformity with the law of a state, constitutes "consent" to be sued in a federal court for that

state and satisfies the requirements of the federal statute providing that where jurisdiction is founded on diversity of citizenship, suit shall be brought only in the district of the "residence" of either plaintiff or defendant.

In *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4 (1939), a suit based upon a Federal question, the Supreme Court of the United States said at pages 6-7:

> "At the threshold we are met by the procedural objection, seasonably made, that Wilson & Co., a Delaware corporation, was improperly sued in the District Court of the Western District of Oklahoma. The objection is unavailable. Prior to this suit, Wilson & Co. had, agreeable to the laws of Oklahoma, designated an agent for service of process 'in any action in the State of Oklahoma'. Both courts below found this to be in fact a consent on Wilson & Co.'s part to be sued in the courts of Oklahoma upon causes of action arising in that state. The Federal District Court is, we hold, a court of Oklahoma within the scope of that consent, and for the reasons indicated in *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, Wilson & Co. was amenable to suit in the Western District of Oklahoma."

Likewise, in *Mississippi Publishing Corporation* v. *Murphree*, 326 U. S. 438 (1946), the Supreme Court of the United States said at page 441:

> "Since there was jurisdiction of the present suit on the sole ground of diversity of citizenship and since the suit was brought in the district of the plaintiff's residence, as found by both courts below, there was, by Sec. 51 of the Judicial Code, no want of venue and the court was not warranted in dismissing the suit if the service of summons was effective to make the defendant a party. *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165 on which petitioner relies, supports no different conclusion. There the sole ground of jurisdiction was diversity of citizenship of the parties. The foreign corporation was sued in the district court for southern New York, in which neither the plaintiff nor

the defendant was a citizen or resident, but where the defendant was doing business, maintained an office, and had consented to be sued by appointing a resident to receive service of process. Recognizing that Sec. 51 of the Judicial Code, in cases where the jurisdiction is founded on diversity of citizenship, established venue as the place where the suit may be maintained for the convenience of the parties, and the statutory venue for a suit of which the court has jurisdiction may be waived, we held that the corporation had waived objections to venue by its consent to the suit. By designating an agent to receive service of process and consenting to be sued in the courts of the state, the corporation had consented to suit in the district court, being a court sitting for a district within the state and applying there the laws of the state, and it had thus waived the venue provisions of Sec. 51 of the Judicial Code."

B.

The Defendant waived venue by doing business in Illinois for twenty years.

Paragraph 5 of the Amended Complaint alleges that "*The Chase National Bank of The City of New York, defendant herein, is and has been since January* 5, 1931, . . . *doing business in the State of Illinois*" (Trans. 17). This allegation stands admitted as a matter of law. Defendant admits in defendant's Exhibits "F" and "G" that it is doing business in Illinois "in connection with its acceptance and execution of trusts and receipts of deposits of trust funds in Illinois", and that it has, for a number of years, filed Annual Reports with the Secretary of State of the State of Illinois "in connection with its acceptance and execution of trusts and receipt of deposits of trust funds in Illinois" (Trans. 26-28). It, therefore, stands admitted that the defendant is "doing business" in Illinois and has been doing so continuously for a number of years.

Ever since the United States has been in existence it has been the law in the Federal Courts that *a corporation, by doing business in a state other than that in which it is chartered, waives venue and subjects itself to being sued in the state where it is doing business.*

This principle has been consistently followed. Thus, in *St. Clair* v. *Cox,* 106 U. S. 350 (1882), an action was sustained on a promissory note brought in the Federal Court for the Eastern District of Michigan, where the defendant corporation was doing business.

In *Lumbermens Ins. Co.* v. *Meyer,* 197 U. S. 407 (1905), an action was sustained on a fire insurance policy in the Federal Court for the Western District of New York, where the defendant, a Pennsylvania corporation, was doing business.

In *Commercial Mutual Accident Co.* v. *Davis,* 213 U. S. 245 (1909), an action was sustained on an insured loss in the Federal Court for the Western District of Missouri, where the defendant, a Pennsylvania corporation, was doing business.

In *St. Louis S. W. R. Co.* v. *Alexander,* 227 U. S. 218 (1913), an action was sustained for damages to a shipment of goods in the U. S. District Court for the Southern District of New York, where the defendant, a Texas corporation, was doing business.

The holdings in the above cases were summarized by the Supreme Court of the United States in *International Shoe Co.* v. *State of Washington,* 326 U. S. 310 (1945), where the Supreme Court said at pages 316-317:

> "Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, *Klein* v. *Board of Supervisors,* 282 U. S. 19, 24, it is clear that unlike an individual its 'presence'

without as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it.

• • •

" 'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. *St. Clair* v. *Cox,* 106 U. S. 350, 355; . . . *Pennsylvania Lumbermen's Ins. Co.* v. *Meyer,* 197 U. S. 407, 414-415; *Commercial Mutual Co.* v. *Davis,* 213 U. S. 245, 255-256; . . . *cf. St. Louis S. W. R. Co.* v. *Alexander,* 227 U. S. 218."

The case at bar is much stronger in favor of plaintiff than any case cited above, for, in the case at bar, the defendant has been licensed in the State of Illinois to do business for approximately 20 years (Trans. 19), has a registered agent upon whom process is to be served (Trans. 19-20) and, in addition to that, has another office in Chicago, is a subscriber to telephone service in Chicago, is listed in the Chicago Classified Telephone Directory, maintains a teletype station in Chicago (Trans. 28-29), and most of the facts involved in the transaction in the case at bar took place at Chicago Illinois (Trans. 29).

C.

The Defendant was properly served in accordance with Rule 4(d)(3) of the Federal Rules of Civil Procedure.

Rule 4 (d)(3) of the Federal Rules of Civil Procedure provides:

"Service shall be made as follows: . . . Upon a . . . foreign corporation . . . by delivering a copy of the summons and of the complaint to an officer, a managing or *general agent, or any other agent authorized by appointment . . . to receive service of process*". (Emphasis ours).

The defendant was served by the United States Marshal by delivery of a summons and complaint to the C. T. Corporation System, the Illinois Registered Agent of The Chase National Bank of the City of New York (Trans. 16). Thus, service was had upon the defendant as provided for by the Federal Rule, promulgated by the Supreme Court of the United States.

In this connection, it should be noted that Rule 4(d)(3) points out that service may be had upon a "general agent" or "any other agent authorized by appointment". Thus, the rule makes it clear that as to process upon an agent authorized by appointment, as in the case at bar, no general agency is needed. The general agency is only needed where there is no appointment to receive service of process. Since in the case at bar the registered agent was appointed by the defendant, the scope of his agency is entirely immaterial.

D.

The Defendant was properly served in accordance with Rule 4(d)(7) of the Federal Rules of Civil Procedure.

Rule 4(d)(7) of the Federal Rules of Civil Procedure provides:

> " . . . it is also sufficient if the summons and complaint are served . . . in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

Section 111 of The Business Corporation Act of Illinois (Ill. Rev. Stat. 1949, chapter 32, Section 157.111) provides:

> "*Service of process in any suit, action or proceeding,* or service of any notice or demand required or permitted by law to be served on a foreign corporation may be made on such corporation *by service thereof on the registered agent* of such corporation." (Emphasis ours).

It is, therefore, clear that service of process upon the registered agent is sufficient and whether the foreign corporation gave that agent general or limited authority is entirely immaterial.

It is also to be noted that Section 17 of the Illinois Civil Practice Act (Ill. Rev. Stat. 1949, chapter 110, Section 141) provides:

> "An incorporated company may be served with process by leaving a copy thereof with *any* officer or *agent* of said company found in the county." (Emphasis ours).

This law is applicable to every corporation without exception, because Section 22 of Article IV of the Illinois Constitution of 1870 provides that "The General Assembly shall not pass local or special laws . . . granting to any corporation, association or individual any special or exclusive privileges, immunity or franchise whatever".

Thus, again, by the law of Illinois, which is made applicable here by Rule 4 (d)(7) of the Federal Rules of Civil Procedure, service upon "any agent" is sufficient and whether the agent is a general or limited agent is immaterial.

E.

Defendant's contention is contrary to Law and Facts of which all Courts take Judicial Notice.

The defendant bases its case upon the following *double-hearsay statement of one Charles Y. Freeman* (Trans. 25):

> "In January, 1934, he was advised by R. Allen Stephens (who thereafter became Chase's registered agent in Illinois) that A. C. Margrave, Head of the Corporation Department of the Office of the Illinois Secretary of State, informed Mr. Stephens that there was no reason why Chase could not limit the authority of its Registered Agent in Illinois to matters 'in connection with

its acceptance and execution of trusts and receipt of deposits of trust funds in Illinois."

Let us examine this statement of Freeman:

1. At the outset it is to be noted that it is a statement based on *double hearsay;* that is, the statement is made by Freeman that he was told by Stephens and that Stephens in turn was told by Margrave. This is probably the worst form of hearsay known to law. Our investigation shows that both A. C. Margrave and R. Allen Stephens have been dead for years, and, of course, "dead men tell no tales", of which fact Freeman is fully aware. If this statement was ever considered of any consequence, why was it not put in writing by Margrave?

2. There is nothing in the statement of Margrave that has any reference to service of process. If Margrave meant that the Chase National Bank could in its private relations with its agent limit its authority, that statement would be correct. If, however, Margrave meant that the Chase National Bank could limit the service of process upon an Illinois registered agent, such statement would be absolutely wrong and directly contrary to the statute and the Constitution of Illinois, of which this court takes judicial notice. From the bare statement of Freeman there is no inkling that Margrave's statement had anything to do with service of process upon an Illinois Registered Agent.

3. The statement says that Margrave was the head of the "Corporation Department". This court takes judicial notice of the fact that there is no "Corporation Department" in Illinois (Ill. Rev. Stats., 1949, Ch. 127, Secs. 2 and 3). This court also takes judicial notice of the fact that the Illinois Secretary of State is the chief officer in Illinois in charge of corporate matters (Ill. Rev. Stats. 1949, Ch. 32) and that in 1934 Edward J. Hughes was the Secretary of State of Illinois, not A. C. Margrave.

In *Springfield* v. *Carter,* 175 F. 2nd, 914 (C. A. 8, 1949), the court said at page 917:

> "This court, however, may take judicial notice not only of the constitution and statutes of Arkansas and of the decisions of the courts of the State but also of the names of the officers occupying positions under the laws of the state. *Keyser* v. *Hitz,* 133 U.S. 138, 146, 10 S. Ct. 290, 33 L. Ed. 531; *Roth* v. *Baldwin,* 64 App. D. C. 90, 74 F. 2nd 1003; *Cooper* v. *O'Connor,* 69 App. D. C. 100, 99 F. 2d 135, 118 A.L.R. 1440; *MacKusick* v. *Johnson,* 1 Cir., 3 F. 398, 401".

In *Richardson* v. *MacChesney,* 218 U. S. 487, 492, the Supreme Court of the United States held that judicial notice would be taken that a certain person was no longer the Secretary of State of Kentucky.

In *Greeson* v. *Imperial Irrigation District,* 59 F. 2nd, 529 (C. A. 9), the court said at page 530:

> "When a pleader states matter as fact which is out of harmony with facts which the court judicially knows, the averments in the pleading are disregarded. *Jones* v. *United States,* 137 U. S. 202, 11 S. Ct. 80, 34 L. Ed. 691; *Pearcy* v. *Stranahan,* 205 U. S. 257, 27 S. Ct. 545, 51 L. Ed. 793; *Middlesex Transportation Co.* v. *Pennsylvania R. Co.,* 82 N. J. Eq. 550, 89 A. 45; *Heiskell* v. *Knox County,* 132 Tenn. 180, 177 S. W. 483, Ann. Cas. 1916E, 1281; *McSween* v. *State Live Stock Sanitary Board,* 97 Fla. 750, 122 So. 239, 65 A.L.R. 508".

Therefore, the *double-hearsay* statement of Freeman must be completely disregarded.

III.

Section 94 of Title 12 is Not Exclusive and the Present Action May be Brought Under Section 1391 of Title 28 of the United States Code.

A.

The District Court for the Northern District of Illinois is the proper venue by virtue of the plaintiff's residence.

Paragraph 1 of the Amended Complaint states: "Frank G. Buffum, the plaintiff, is a citizen of the State of Illinois, and resides at Chicago, Illinois, in the Northern District of Illinois." Paragraph 5 of the Amended Complaint states: "The venue of this action is laid in the United States District Court for the Northern District of Illinois, in accordance with Title 28 of the United States Code, Section 1391." (Trans. 16-17).

Section 1391(a) of Title 28 of the U. S. Code provides: "*A civil action wherein jurisdiction is founded only on diversity of citizenship may,* except as otherwise provided by law, *be brought* only *in the judicial district where all plaintiffs* or all defendants *reside.*" (Emphasis ours). Since there is only one plaintiff, and he resides at Chicago in the Northern District of Illinois, and since this suit is founded only on diversity of citizenship, the venue was properly laid in the United States District Court for the Northern District of Illinois.

B.

Section 94 of Title 12 of the United States Code has no application to the case at bar.

The defendant, The Chase National Bank of the City of New York, relies on Title 12 U. S. C. Section 94 and the cases decided thereunder. *But Section* 94 *of Title* 12 *of the*

U. S. Code has no application to the case at bar. Section 94 of Title 12 expressly provides that "Actions and proceedings against any association *under this chapter* may be had in any district or Territorial Court of the United States held within the district in which such association may be established . . ." (Emphasis ours). The chapter which Section 94 refers to is Chapter 2 of Title 12 of the U. S. Code. This chapter deals with the organization and dissolution of national banks and the relationship between national banks and their officers, directors and depositors. Section 94 on which defendant relies is expressly limited to "actions and proceedings against any association under this chapter". The case at bar has nothing to do with the organization or dissolution or the relationship between a national bank and its officers, directors or depositors. The plaintiff has brought the case at bar to this court because of "diversity of citizenship" and paragraph 4 of the Amended Complaint specifically so states (Trans. 17):

> "The United States District Court has original jurisdiction of this action, as the matter in controversy exceeds the sum of Three Thousand Dollars, exclusive of interest and costs, and is between citizens of different states, as provided in Title 28 of the United States Code, Section 1332".

The distinction between actions under Chapter 2 of Title 12 of the U. S. Code, to which Section 94 of Title 12 is applicable, and "diversity jurisdiction" cases, to which Section 94 of Title 12 of the U. S. Code is not applicable, is clearly set out in Section 1348 of Title 28 of the U. S. Code, which went into effect on September 1, 1948, as follows:

> "The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the

affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

"All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located". (Emphasis ours).

C.

Section 94 of Title 12 of the United States Code is merely permissive, not exclusive.

Section 94 of Title 12 of the U. S. Code, upon which the defendant relies, does not contain any words of exclusion. Section 94 of Title 12 of the U. S. Code provides:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial Court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

It is to be noted that the word "only" does not appear anywhere in said Section 94. An examination of the whole U. S. Code shows that whenever Congress desired to restrict venue to a particular judicial district it employed the word "only".

Thus:

1. In Section 20 (11) of Title 49 of the U. S. Code, dealing with the liability of initial and delivering carriers for loss, it is provided "That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought and may be maintained, if in a district court of the United States, *only* in a district, and if in a

State Court, *only* in a State through or into which the defendant carrier operates a line of railroad."

2. In Section 46(b) of Title 11 of the U. S. Code, dealing with action by receivers and trustees in bankruptcy, it is provided that "Suits by the receiver and the trustee shall be brought or prosecuted *only* in the courts where the bankrupt might have brought or prosecuted them."

3. In Section 1398 of Title 28 of the U. S. Code, it is provided that an action to enforce, suspend or set aside an order of the Interstate Commerce Commission "shall be brought *only* in the judicial district wherein is the residence or principal office of any of the parties bringing such action."

4. In Section 1399 of Title 28 of the U. S. Code, dealing with partition action involving the United States, it is provided that the action "may be brought *only* in the judicial district where such lands are located or, if located in different districts of the same state, in any of such districts."

5. In Section 1391(a) of Title 28 of the U. S. Code, dealing with jurisdiction founded on diversity of citizenship, it is provided that the action may "be brought *only* in the judicial district where all plaintiffs or all defendants reside."

6. In Section 1391(b) of Title 28 of the U. S. Code, it is provided that civil actions not founded solely on diversity of citizenship "may be brought *only* in the judicial district where all defendants reside."

7. In Section 1402(a) of Title 28 of the U. S. Code, dealing with civil actions against the United States, it is provided that the action "may be prosecuted *only* in the judicial district where the plaintiff resides."

8. In Section 1402(b) of Title 28 of the U. S. Code, dealing with civil actions on tort claims against the United States, it is provided that the action "may be prosecuted *only* in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred."

In contrast with the above exclusionary provisions as to venue, the other provisions as to venue contained in the U. S. Code do not have the word "only", thus making it clear that whenever Congress wanted to restrict venue to a particular district it used the word "only" and whenever Congress wanted to make a particular judicial district merely permissive as to venue it did not use the word "only".

The Court of Appeals, in its opinion, quotes two sentences from *Cope* v. *Anderson*, 331 U. S. 461, 467. It is essential to note that this case did not involve any question of jurisdiction, venue or service of process, and the only question considered by the Supreme Court of the United States in that case was the application of certain statutes of limitation. However, a *dictum* pertaining to national banks does appear at page 467, but the Supreme Court limits itself to a situation where the bank does business in one state and in no other place, and the Supreme Court, at page 467, said: "THE BANK WAS AUTHORIZED TO DO ITS BANKING BUSINESS IN LOUISVILLE AND DID BUSINESS IN NO OTHER PLACE". Thus, a national bank which is established in a particular state and does not become licensed to do business and appoints no agent for service of process in another state is, of course, in a different position from a national bank which has its principal office in one state and becomes licensed to do business in another state and appoints an agent for service of process in such other state, and holds a Certificate of

Authority for 99 years "subject to ALL the liabilities imposed by law upon foreign corporations," (Trans. 19), as the defendant is and has been doing in Illinois for 20 years.

CONCLUSION.

We respectfully submit that:

I. Section 1391(c) of Title 28 of the United States Code is applicable to all defendant corporations.

II. The defendant waived venue.

- A. The defendant waived venue by the appointment of an Illinois agent for service of process.
- B. The defendant waived venue by doing business in Illinois for twenty years.
- C. The defendant was properly served in accordance with Rule 4(d)(3) of the Federal Rules of Civil Procedure.
- D. The defendant was properly served in accordance with Rule 4(d)(7) of the Federal Rules of Civil Procedure.
- E. Defendant's contention is contrary to law and facts of which all courts take judicial notice.

III. Section 94 of Title 12 is not exclusive and the present action may be brought under Section 1391 of Title 28 of the United States Code.

- A. The District Court for the Northern District of Illinois is the proper venue by virtue of the plaintiff's residence.
- B. Section 94 of Title 12 of the United States Code has no application to the case at bar.
- C. Section 94 of Title 12 of the United States Code is merely permissive, not exclusive.

WHEREFORE, your petitioner, Frank G. Buffum, prays this Honorable Court that the judgments of the United States District Court for the Northern District of Illinois and of the United States Court of Appeals for the Seventh Circuit be reversed and remanded with instructions to proceed in accordance with the views of this Honorable Court.

Respectfully submitted,

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and
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